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The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation

Jernej Sekolec and Michael B. Getty***

A quarter of a century ago, dispute resolution was relatively easily defined. In the United States, it essentially consisted of some negotiation, and when that failed, trial. Internationally, arbitration prevailed as the primary means by which private parties from different countries resolved their commercial disputes.

Today, however, mediation – or “conciliation,” as it is commonly known internationally – is much more commonplace. It is a fundamentally different process than trial and arbitration, because it calls for the parties to work out their differences themselves, in accordance with their underlying interests and with the assistance of a third party neutral mediator, rather than having the third party neutral decide the dispute. To be sure, trial and arbitration remain mainstays of dispute resolution across the world. However, mediation has been gaining ground in recent years, and the adoption by the United States and the United Nations of similar standards for domestic U.S. and international mediations reflects that assertion. Indeed, the Uniform Mediation Act (UMA)¹ and the United Commission on International Trade Law Model Law for International Commercial Conciliation (UNCITRAL Model Law)² reflect the emergence of an international consensus about the importance of mediation as a mainstream method of resolving disputes, as well as about the importance of confidentiality to that process.

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1. Unif. Mediation Act (2001). For a discussion, see James J. Alfini, *Mediation's Coming of (Legal) Age*, 22 N. Ill. U. L. Rev. 153 (2002).

2. U.N. Doc. A/57/17 (2002), Annex 1. UNCITRAL adopted the UNCITRAL Model Law on 28 June 2002. Prior to the enactment of this Model Law, UNCITRAL had adopted the UNCITRAL Conciliation Rules at its thirteenth session in 1980. .N. Doc 35/52 (1980). The United Nations General Assembly recommended in Resolution No. 35/52 of Dec. 4, 1980, the use of the UNCITRAL Conciliation Rules “in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation.” In that resolution the General Assembly recognized the value of conciliation as a method of an amicable settlement of disputes arising in international commerce, and it expressed the view that the Rules are acceptable in countries with different legal, social and economic systems. *United Nations Commn. On Intl. Trade Law (UNCITRAL): UNCITRAL Conciliation Rules* <www.uncitral.org/english/texts/arbitration/conc-rules.htm> (accessed Mar. 10, 2003).

Widespread adoption of both laws is in the interest of both enhancing the mediation and conciliation processes, and expanding national and international trade and commerce. Both simplify the law, and make it more certain and reliable for participants. At the same time, both respect the unique needs, customs, and traditions of the different sovereigns in which the laws will operate domestically and internationally. In the United States, state adoptions of the UMA will begin to harmonize the more than 2,500 widely varying laws currently affecting mediation – nearly 250 of which address confidentiality alone. Similarly, international adoption of the Model Law will begin to provide common ground among the 90 member nations who participated in the UNCITRAL sessions on the Model Law, as well as the many other nations that have long looked to UNCITRAL for legislative guidance.

This article concerns the intersection of these two historic efforts, and how they come together to forge an international consensus on the law's recognition of the importance of the mediation and conciliation process, as well as the central values of those processes: personal autonomy and self-determination, confidentiality, and neutrality. In this regard, the harmony of both efforts is vital. Just as the UMA will stabilize domestic mediation law in a way that comports with and supports the reasonable expectations of the parties and the larger system of law, so the U.S. adoption of the Model Law will give foreign parties assurance that U.S. law is familiar and hospitable for international commercial mediation, making them more inclined to accept U.S. mediation clauses. Similarly, foreign adoption would assure American businesses that modern dispute settlement techniques are legally supported worldwide.

As a member and Secretary of UNCITRAL and chair of the respective UNCITRAL and UMA Drafting Committees, we are striving to ensure the two measures work together as seamlessly as possible, and that they coordinate well with the sovereign laws in which they are ultimately adopted. Thanks to the efforts of Jeffery D. Kovar, the Assistant Legal Advisor for Private International Law at the U.S. Department of State, it was possible to achieve the two texts being substantially similar in most important respects. Today this work continues as the UMA Drafting Committee has been reconvened to draft a proposed amendment to the UMA for states that want to provide the maximum assurance of compliance with the international standards that the UNCITRAL Model Law is sure to set.

In this article, we describe how these two efforts have come together to forge an international consensus on mediation and conciliation. In Part I, we look at how some of the different ways that domestic nationals treat the confidentiality of conciliation communications. The disparity of these treatments leads to considerable uncertainty among parties to a conciliation. In Part II, we note the essential features of the UNCITRAL Model Law, and how it addresses this uncertainty through model rules that will harmonize international standards among adopting nations, at least on core issues, while at the same time preserving the flexibility that is necessary for conciliation practices and respecting the autonomy of domestic sovereigns. Finally, in Part III, we compare the UNCITRAL Model Law to the UMA, and discuss the current effort to draft an amendment to the Uniform Mediation Act that will permit states in the United States to assure the harmony between the UMA and the UNCITRAL Model Law.

I. THE INTERNATIONAL CONCILIATION LANDSCAPE

The law of conciliation internationally is similar to that in the United States in that there is a wide variety of practices and experiences among domestic nations, as well as among transnational organizations that provide or use conciliation services.³ In this section, we focus on a few of those experiences to help illustrate that breadth of law, customs and practices, and developmental stages that give rise to a real need for a uniform international rule for commercial conciliations. Australia, Chile, and China provide a sense of the variety of domestic experiences. Similarly, the International Chamber of Commerce, World Intellectual Property Organization (WIPO), and the Organization for Security and Cooperation in Europe (OSCE) Court of Conciliation and Arbitration provide a sense of the prevailing direction of conciliation.

A. Domestic nations

1. Australia

In the southern hemisphere, alternative dispute resolution is a widely recognized and significant feature of the Australian justice system. State courts are increasingly referring matters, in some cases compulsorily, to ADR.⁴ There are a number of internationally prominent ADR centers located in Australia, including the Australian Centre for International Commercial Arbitration, Australian Commercial Disputes Centre, and LEADR (an Australasian not-for-profit membership organization).⁵ In addition, there are other organizations that promote various forms of ADR such as the Institute of Arbitrators & Mediators Australia and the Australasian Dispute Centre.

In a response to the growing use of ADR in Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 to provide independent policy advice to the federal attorney-general on the development of high quality, economic, and efficient ways of resolving disputes before they come before federal courts. In fact, in some Australian jurisdictions, such as New South Wales, solicitors are required to advise clients of the various ADR options, the processes involved and the advantages of using ADR.

Despite this growth, and because of it, the Australian experience is similar to the United States with respect to confidentiality protections for mediations or conciliations in that laws, standards, and practices vary widely. For example, *The New South Wales Supreme Court Act of 1970* provides "Evidence of anything said or of any admission made in a mediation session or early neutral evaluation session is not admissible in any proceeding before any court, tribunal or body," but this is not believed to be a uniform practice.

3. Unif. Mediation Act, *Prefatory Note* cmts. 3 and 4 (2001) (citing analysis of state mediation confidentiality laws).

4. *A Guide to Arbitration and ADR in APEC member economies*, Asia-Pacific Economic Cooperation (Feb. 11, 2003) (available at <<http://www.arbitration.co.nz/content.asp?section=ADR&country=AUS>> (accessed Apr. 1, 2003)).

5. See *About LEADR* <<http://www.leadr.com.au/about.html>> (accessed Apr. 1, 2003).

The legal implications of various procedures will be dependent upon what is agreed between the parties; generally the results of negotiation, mediation, and conciliation are not binding on the parties, while the results of arbitration are. In any event, parties can contractually agree to the binding nature of the results. Judicial intervention during any ADR process remains open to parties at all stages. Finally, Australian statutory law does not provide for the recognition and enforceability of conciliation settlements. Instead, such settlements may only be enforced contractually.

2. Chile

In Latin America, Chile has long embraced arbitration as a method of alternative dispute resolution for commercial matters. It is only more recently that mediation and other forms of dispute resolution are coming to be accepted. For instance, the Chamber of Commerce of Santiago has inaugurated a mediation service and the Ministry of Justice is proposing to introduce a national mediation system, to be mandatory for family matters.⁶

Although there is no law that generally mandates mediation, it is available at the Arbitration and Mediation Centre of the Chamber of Commerce of Santiago (AMCCCS) on a voluntary basis.⁷ The AMCCCS has its own statute and code of ethics for mediators. At any time during the mediation, the parties may resort to the courts or arbitration without any legal consequences. A recent development has been the enactment of law on consumer protection, which establishes a form of mandatory conciliation.⁸ Parties can also consent to conciliation outside of the court system and arbitration. If the outcome is mutually acceptable, the result will be a transaction contract.⁹ In most civil cases (with few exceptions), conciliation is a mandatory step once a lawsuit is filed and is conducted by the judge according to the Code of Civil Procedure.¹⁰

Although there are no specific legal provisions for confidentiality, parties can contractually bind the mediator to confidentiality,¹¹ and in practice confidentiality would generally be protected by signing a confidentiality agreement, including a penal clause should the agreement be broken.¹² A settlement agreement reached between the parties outside the court is legally regarded as a transaction contract, which can be enforced by the court. The transaction contract is regulated in the Civil Code of Chile.¹³ In court cases, an agreement reached in a conciliation has the force of a decision rendered by the judge, and it is enforceable according to the

6. *A Guide to Arbitration and ADR in APEC Member Economies*, Asia-Pacific Economic Cooperation <<http://www.arbitration.co.nz/content.asp?section=ADR&country=CHL>> (accessed Feb. 11, 2003).

7. *Id.*

8. See *Free Trade of the Americas Questionnaire*, FTAA Negotiation Group on Dispute Settlement: Questionnaire: Chile <<http://www.ftaa-alca.org/busfac/comarb/Chile/queschie.asp>> (accessed Apr. 1, 2003).

9. See *supra* n. 6.

10. *Id.*

11. See *supra* n. 8.

12. See *supra* n. 6.

13. *Id.*

Code of Civil Procedure.¹⁴ In rare cases, agreements that are reached before administrative authorities – for example, before labor administrative authorities -- may also be valid as judicial decisions.¹⁵

3. *The People's Republic of China*

In China, conciliation and mediation are the main forms of dispute resolution for civil disputes, and seem to have been accepted as part of the national dispute resolution system.¹⁶

According to the Mediation Rules for the Beijing Mediation Centre, cases will only be accepted after the parties have consented to mediation. Under the Mediation Rules for the Beijing Mediation Centre, the Centre maintains a panel of mediators who are selected and appointed by the China Council for International Trade (CCPIC) or its respective branch mediation center. When parties apply for mediation, they appoint or authorize the Centre to appoint one or two mediators from the Centre's panel. The mediators will conduct the mediation in the way they consider appropriate, meeting or communicating with the parties together or separately for example.¹⁷

China for the most part leaves confidentiality to party self-determination. That is to say, when the mediator receives information from a party, the mediator may presumptively disclose it to the other party. However, the parties can require the information to be kept confidential. No special rules have been given to govern confidentiality and admissibility of evidence in other proceedings during the mediation.

According to Chinese Civil Procedure Law, when hearing a case, the People's Court -- either one judge or the collegial bench -- conducts mediation based on the will of the parties.¹⁸ Mediation is conducted at the court venue with the hearing judge as the mediator. Simple procedures are adopted to notify the parties and witnesses to appear in court, and further, relevant individuals may be asked by the Court to assist the mediation. The mediation agreement should be reached with the consent of the parties and without evident duress.¹⁹ When an agreement is reached, the court makes a mediation statement that becomes valid once the parties sign and accept it. When no agreement can be reached or one of the parties does not fulfill his obligations before the completion of the agreement, the court shall pronounce judgment on the case.²⁰

14. *Id.*

15. *Id.*

16. *A Guide to Arbitration and ADR in APEC Member Economies*, Asia-Pacific Economic Cooperation <<http://www.arbitration.co.nz/content.asp?section=ADR&country=CHN>> (accessed Feb. 11 2003).

17. An interesting feature of the process is that if the mediation fails, the mediators may, with the consent of the parties, be appointed as arbitrators in the subsequent arbitration proceedings.

18. *See supra* n. 16..

19. *Id.*

20. *Id.*

B. Transnational organizations

1. The International Chamber of Commerce

The International Chamber of Commerce (ICC) is a global business organization which works to further open trade, the market economy system, business self-regulation, and dealing with commercial crime. It was founded in 1919 and is located in Paris. Its international secretariat offers a wide range of services including dispute resolution and deals with national governments and intergovernmental organizations from around the world on issues that affect business operations.²¹ The ICC has thousands of member companies and associations in around 130 countries, including many of the world's most influential companies. The ICC also represents every major industrial and service sector.

The International Chamber of Commerce issued the ICC ADR Rules (the "Rules") in 2001 for "the use of parties who wish to settle their disputes or differences amicably with the assistance of a third party, the Neutral, within an institutional framework."²² The rules apply to both international and domestic disputes, but only if they are commercial in nature.

The ICC ADR Rules provide for flexibility and emphasize party autonomy, allowing parties to decide on the method of settlement involving a third party neutral that is most suitable for them. If parties cannot agree, then mediation is employed. Any settlement reached by the parties will be binding upon them in accordance with the applicable law of the agreement. Parties can also opt for neutral evaluation which can be a non-binding opinion or evaluation.

The proceedings are confidential. Article 7 of the ICC ADR Rules outlines the treatment of confidentiality. All proceedings are confidential unless otherwise agreed by the parties. They may agree that all or part of the proceedings will not be confidential. The Neutral is not allowed to act as a witness in any other proceedings related to the dispute submitted to the ICC ADR proceedings, unless all of the parties agree otherwise or applicable law requires him or her to do so.²³

There are significant limitations on this general rule of confidentiality, however. Most importantly, a party may disclose any given element of the ICC ADR proceedings if it is required to do so by applicable law.²⁴ In this important sense, the rules appear to defer to domestic law with regard to the admissibility of mediation communications in subsequent proceedings, and therefore add little assurance of confidentiality in such matters. Further, the settlement agreement may be disclosed if such disclosure is required for its implementation or enforcement.²⁵

21. See ICC The World Business Organization, *What is ICC?* <http://www.iccwbo.org/home/menu_what_is_icc.asp> (accessed Apr. 1, 2003).

22. See *ADR Dispute Resolution Services*, Introduction to ICC ADR Rules <<http://www.iccwbo.org/drs/english/adr/guide.asp#5>> (accessed Apr. 1, 2003).

23. *Id.* at Article 7(4).

24. *Id.* at Article 7(2).

25. Article 7(1) ICC ADR Rules <<http://www.iccwbo.org/drs/english/adr/guide.asp#5>> (accessed Apr. 1, 2003).

On other issues, a Neutral can act in further arbitral or judicial proceedings or as an expert or representative of one of the parties in the ADR proceedings, unless the parties agree otherwise in writing.²⁶ Further, liability of ICC, its personnel, and the ICC National Committees is excluded for any act or omission in connection with the ICC ADR proceedings.²⁷

2. *The WIPO Arbitration and Mediation Center*

The WIPO Arbitration and Mediation Center is based in Geneva, Switzerland, and was established in 1994 to offer arbitration and mediation services for the resolution of international commercial disputes between private parties.²⁸ The Center offers specialized services for mediation of intellectual property disputes. A mediator appointed under the WIPO Mediation Rules is competent to deal with all aspects of any dispute.²⁹ It is up to the parties to decide whether they consider the subject matter suitable for WIPO mediation. By agreeing to submit a dispute to WIPO mediation, the parties adopt the WIPO Mediation Rules as part of their agreement to mediate unless they make an agreement to the contrary.³⁰ Those Rules have the following main functions:

- a. They establish the non-binding nature of the procedure;³¹
- b. They define the manner in which the mediator will be appointed;³²
- c. They set out the manner of determination of the mediator's fees;³³
- d. They provide guidance on procedure and commencement of mediation;³⁴
- e. They provide for the confidentiality of the process and the disclosures made during the process;³⁵
- f. They determine how the costs of the procedure will be borne by the parties.³⁶

Comparatively speaking, the confidentiality rules for WIPO mediations are well defined, with separate rules governing admissibility in proceedings and disclosures outside of proceedings. With respect to non-proceeding disclosures,

26. *Id.* at Article 7(3).

27. *Id.* at Article 7(5).

28. *WIPO Arbitration and Mediation Center*, About the Center, <<http://www.arbiter.wipo.int/center/index.html>> (accessed Mar. 14, 2003).

29. *Id.* at <<http://www.arbiter.wipo.int/mediation/guide/index.html>> (accessed Mar. 14, 2003).

30. *Id.*

31. *Id.* at Articles 13(a) and 18(iii).

32. *Id.* at Article 6.

33. *Id.* at Article 22.

34. *Id.* at Articles 3 – 5 and 12.

35. *Id.* at Articles 14-17.

36. *Id.* at Article 24.

Article 15 states that every person involved in the mediation "shall respect the confidentiality of the mediation and may not, unless otherwise agreed by the parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation." Every person involved is also required to sign a confidentiality undertaking prior to getting involved in the proceedings.

Article 17, by contrast, focuses on admissibility, and generally effects an agreement among mediation participants not to testify with regard to certain specifically enumerated issues, such as admissions made during the course of the mediation, and settlement proposals and responses.³⁷ The WIPO rules also call for the destruction of mediation notes, and the return of all records used without copying.³⁸

Recently, there has been a marked increase in the number of arbitrations and mediations under the WIPO Arbitration Expedited Arbitration and Mediation Rules that have been filed with the Center.³⁹ The subject matter of the proceedings included both contractual disputes, e.g., patent and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and research and development agreements, and non-contractual disputes, e.g., patent infringement.⁴⁰ Parties to the disputes have been from various jurisdictions including Austria, China, France, Germany, Hungary, Ireland, Israel, Japan, the Netherlands, Panama, Switzerland, the United Kingdom, and the United States.⁴¹

3. The OSCE Court of Conciliation and Arbitration

The OSCE Court of Conciliation and Arbitration ("the OSCE Court"), also based in Geneva, was established in 1992 to settle disputes submitted to it by state parties to the Convention on Conciliation and Arbitration within the OSCE, which entered into force on Nov. 9, 1994.⁴² The OSCE Court deals with disputes between state parties, and not private individuals. The OSCE Court's registry maintains a list of eminent personalities who may be appointed as conciliators or mediators to any dispute.

Upon application of the parties, a Conciliation Commission will be set up to "...assist the parties⁴³ to the dispute in finding a settlement in accordance with international law and their CSCE commitments."⁴⁴ The rules of procedure are made at the discretion of the Conciliation Commission upon consultation with the parties.⁴⁵ If parties are able to reach a mutually acceptable settlement during the

37. See Article 17, i. – iv.

38. See Article 16.

39. WIPO Arbitration and Mediation Center <<http://www.arbiter.wipo.int/center/background.html>> (accessed Apr. 1, 2003).

40. *Id.*

41. *Id.*

42. *Conference for the Security and Co-operation in Europe*, Decision on Peaceful Settlement of Disputes, Third Meeting of the Council (Stockholm, Dec. 1992) <<http://www.osce.org/docs/english/1990-1999/mcs/Anchor--Ann-29464>> (accessed Mar. 14, 2003).

43. *Id.* at Annex 2, Convention on Conciliation and Arbitration within the CSCE, Art. 21 and 22.

44. *Id.* at Art. 24.

45. *Id.* at Art. 23(1).

process with the help of the Conciliation Commission, then they can sign an agreement outlining the terms of settlement, and this will conclude the proceedings.⁴⁶

Remarkably, the OSCE Rules of Procedure are entirely silent on the issue of confidentiality.

What is an unusual feature of the process is that after hearing parties to the dispute, the Conciliation Commission will prepare a report, which contains proposals for settlement. Parties have thirty days to accept or reject the report, after which the report will be submitted to the CSCE Council. If one party does not accept the proposals, the other party will not be bound even if it has accepted the report.⁴⁷ There does not appear to be any enforcement mechanism for the agreements.

II. THE UNCITRAL MODEL LAW

a. The drafting

The Model Law provides harmonized basic rules for countries that wish to create a legal foundation to assist parties to international transactions use mediation to resolve commercial disputes. It will be offered for adoption to all States of the world.

Work on the UNCITRAL Model Law began in 1999 when the Commission, after discussing a note by its secretariat entitled "Possible future work in the area of international commercial arbitration,"⁴⁸ entrusted the preparation of model legislative provisions on conciliation to its intergovernmental Working Group II (Arbitration and Conciliation). An intergovernmental Working Group was convened to engage in the drafting of the Model Law, which in addition to States that were members of UNCITRAL, included more than two dozen international organizations, ADR institutions, and other interested groups as observers. The United States delegation was represented by the Department of State, and included advisers affiliated with the Uniform Law Commissioners and American Bar Association, the American Arbitration Association, and the Maritime Law Association.

After four drafting sessions over the next two years, the Working Group circulated a draft Model Law to UN member States for comments.⁴⁹ The Commission reviewed the draft Model Law at its thirty-fifth session⁵⁰ and adopted the Model Law by consensus on 28 June 2002.⁵¹ During the preparation of the Model Law, some 90 States, 12 intergovernmental organization and 22 non-governmental international organizations participated in the considerations.

Subsequently, the General Assembly adopted a resolution praising the Model Law and recommending that all States give due consideration to the enactment of the UNCITRAL Model Law, in view of the desirability of uniformity of the law

46. *Id.* at Art. 25(1).

47. *Id.* at Art. 25(4).

48. U.N. Doc. A/CN.9/460.

49. Those comments are compiled in document A/CN.9/513 and addenda 1 and 2.

50. The Model Law was adopted by the UNCITRAL June 17-28, 2002 in New York.

51. The report on the work of the session is contained in U.N. Doc.A/57/17

of dispute settlement procedures and the specific needs of international commercial conciliation practice. The preparatory materials for the Model Law have been published in the six languages of the United Nations: Arabic, Chinese, English, French, Spanish, and Russian.⁵² The documents will also ultimately be compiled in the UNCITRAL Yearbook.⁵³

b. The main features of the Model Law

A. Scope issues

1. Limitation to international and commercial disputes

The application of the Model Law is restricted to commercial matters.⁵⁴ This is not only a reflection of the traditional mandate of UNCITRAL, to prepare texts for commercial matters, but also a result of the realization that conciliation of non-commercial matters touches upon policy issues that do not lend themselves to universal harmonization. Nonetheless, the text could be an appropriate model if a country wanted to extend the coverage of the Model Law to certain non-commercial disputes.⁵⁵ In addition, the application of the Law is limited to international cases (as defined in Articles 1(4) and (5)). This prudent approach was adopted by the drafters in light of the differing domestic policies and difficulties of harmonizing such policies across states. However, none of the provisions in the Model Law are *per se* unsuitable for domestic cases, and it is likely that some enacting states will indeed consider extending the Law to domestic conciliations.⁵⁶ If any further additions or changes are deemed necessary to reflect domestic policies, the enacting state should be careful to evaluate whether the additions are suitable for international cases, and if they are not, to make them applicable to domestic cases only.⁵⁷

2. Broad coverage: Where parties request a conciliator

In accordance with the intentions of the participating states, the Model Law will apply to all international and commercial disputes in which a neutral third party has been requested by the parties to help settle the matter, regardless of

52. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

53. The UNCITRAL Secretariat will in due course publish the Model Law together with a Guide to Enactment and Use of the Model Law containing background and explanatory information directed to legislators, but also providing useful insight to users of the text.

54. U.N. GAOR, 57th Sess., Supp. No. 17, Annex 1 at n. 2, U.N. Doc. A/57/17. This definition provides an illustrative list of cases that are understood to be "commercial" cases.

55. U.N. Doc. A/CN.9/468, para. 21; U.N. Doc. A/CN.9/485, paras. 113-116. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

56. U.N. GAOR, 57th Sess., Supp. No. 17, Annex 1, at n. 1, U.N. Doc. A/57/17.

57. U.N. Doc. A/CN.9/485, paras. 117-120; U.N. Doc. A/CN.9/487, ¶¶ 105-109; U.N. Doc. A/CN.9/506, ¶¶ 15-21; U.N. Doc. A/57/17, ¶ 22. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

whether the neutrals are only facilitating the dialogue or are also making substantive proposals as to possible settlement. These methods may differ with respect to the technique used, to the degree to which the third person is involved in the process, and to the kind of involvement they have. In the Model Law they are collectively referred to as "conciliation". Article 1(3) reads:

For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.⁵⁸

This means that the Model Law will apply as long as the process meets the definition, irrespective of how the parties referred to it, and even if they do not use a specific term such as conciliation or mediation. Significantly, this definition also includes "*ad hoc*" conciliations, in which the process is not administered by an institution, and "institutional" conciliations that would ordinarily provide rules by which the conciliation process would normally be governed. In such situations, where parties are proceeding in a conciliation without having specifically designated the applicability of the Model Law, it is up to the interpreter of the Law to decide whether the parties are bound by the provisions on inadmissibility of certain evidence and by the duty of confidentiality in Articles 9 and 10. This decision will be made on the basis of the circumstances of the case what the understanding and expectations of the parties were regarding the process in which they were engaging, and whether, on that basis, the Model Law is applicable.⁵⁹

3. Substantive fairness of conciliation agreements beyond scope

As to the principle of "fair treatment," a concept that was discussed at length during the preparation of the Model Law, it should be stressed that Article 6(3) establishes an obligation incumbent on the conciliator only as regards the process conducted by the conciliator, and that the principle does not extend beyond that aspect to responsibility for the substantive fairness of the agreement itself. In

58. Legislative history: U.N. Doc. A/CN.9/487, ¶¶ 100-104; U.N. Doc. A/CN.9/506, ¶¶ 28-31; U.N. Doc. A/57/17, ¶¶ 36-37. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

59. For example, the Uniform Mediation Act of 2001 provides a clear distinguishing criterion by stating that the Act would apply if "... (2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation." In the international context, it seemed more appropriate to leave this issue to interpretation rather than to link it to formal criteria such as an agreement recorded in a particular form, or the participation of a conciliator who appears on a list of conciliators or holds himself or herself out as offering conciliation services.

particular, the Model Law has not established a standard for measuring the content of any settlement reached by the parties. Settlements are often complex agreements that may include, for example, commitments with respect to existing obligations, restructured obligations, new obligations, agreements to agree, enforceable or non-enforceable promises, apologies, and the like. Thus, it would be beyond the essentially procedural character of the Law to deal with the substance of these matters. It would also be contrary to the purposes of the Law to attempt to extend the principle of fair treatment to the content of contractual settlements, since no such standard exists generally in contract law. This would also guard against it being later used as an instrument for attacking an outcome of conciliation proceedings on the basis of procedure.⁶⁰

B. The centrality of party autonomy

1. The overriding principle

One of the overriding principles of the Model Law is the freedom of the parties to structure the conciliation proceedings as they consider appropriate given that the Model Law deals to a large extent with matters where the interests of the parties should prevail. Hence, Article 3 expresses the general principle that "the parties may agree to exclude or vary any of the provisions of the Law." This is a reflection of the fact that the whole concept of conciliation is dependent upon the wishes of the parties, and that the parties are able to end the conciliation proceedings if they disagree with the process. The two provisions in the Law that are excepted from party autonomy are:

a. Article 2, pursuant to which regard should be had in interpreting the Law to its international origin and to the need to promote uniformity in its application and the observance of good faith, and that questions concerning matters governed by the Law that are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based; and

b. Article 6(3), which prescribes as the overriding principle for the conduct of conciliation proceedings that the conciliator shall seek to maintain fair treatment of the parties, and in so doing, shall take into account the circumstances of the case.

2. Whether to conciliate: The model law imposes no obligation

Apart from instances where conciliation is set in motion by the agreement of the parties after the dispute has arisen, there may exist various grounds pursuant to which the parties may be under a duty to make a good faith attempt at conciliating their differences. For instance, they have entered into a contractual commitment

60. U.N. Doc. A/CN.9/487, ¶¶ 124-25; U.N. Doc. A/CN.9/506, ¶¶ 70-73; U.N. Doc. A/57/17, ¶¶ 56-58. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

before the dispute has arisen (these commitments may be in the nature of, for example, best-efforts clauses, agreements to agree to set a conciliation in motion, or a straightforward commitment to carry out conciliation proceedings). In addition, some countries have adopted legal rules requiring the parties in certain situations to conciliate or allowing a judge or a court official to suggest, or even direct, that parties conciliate before they continue with litigation. Such legal rules embody national policies and circumstances that are not uniform and, therefore, the drafters of the Model Law excluded those issues.

The Model Law is based on the principle that the procedural characteristics of conciliation proceedings and the need for the protections established by the Law (for example, with respect to the inadmissibility of certain evidence, as provided for in Article 10) do not depend on whether the parties conciliate in compliance with a prior agreement, a legal obligation, or a court order. This principle is embodied in Article 1(8) of the Model Law.⁶¹ Even if in the enacting State conciliation is left fully to the agreement of the parties, Article 1(8) ought not be omitted. This provision will clarify the position that the Model Law applies when parties commence a conciliation governed by the law of that State pursuant to a legal obligation arising from a foreign law or from a request by a foreign court.

The Model Law allows the parties to “opt in” to the Model Law by agreement. They can accomplish this either by agreeing that their conciliation is international (even though the circumstances of the case do not indicate its international character or it is unclear whether the case is international), or by expressly agreeing on the applicability of the law.

Finally in this regard, the Model Law does not deal with the consequences of a breach by a party of an obligation to conciliate (for example, by imposing liability for damages or costs or any other procedural consequences in court or arbitral proceedings). Since these issues were rooted in national law of contract or procedure (and not of conciliation procedure) which are difficult to harmonize, it was deemed wise not to include them.

3. How conciliations are to be conducted

The governing principle of the conduct of proceedings is party autonomy as emphasized in Article 6(1): “the parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.”⁶² One such set of rules could be the UNCITRAL Conciliation Rules (1980)⁶³ or the rules of one of the conciliation or mediation centers that offer to administer these types of dispute settlement processes. In practice, agreements of parties on the conduct of conciliation proceedings would be rather general. Article 6(2) of the Model Law and other procedural provisions (e.g. on the appointment of the conciliator, the commencement of conciliation proceedings, termination of proceedings, etc.) are general enough to accommodate different practices. At the same time a minimum procedural framework is provided which offers basic

61. U.N. Doc. A/CN.9/487, ¶¶ 96-97; U.N. Doc. A/CN.9/506, ¶¶ 24-25. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

62. This is consistent with the UMA’s refusal to provide practice procedures.

63. U.N. Doc. 35/52.

procedural guidance to the parties who have not agreed on any set of conciliation rules.

As noted above, the same article provides that the conciliator must seek to maintain "fair treatment" of the parties by reference to the circumstances of the case. This mandatory obligation is regarded as a basic one and a minimum standard (as noted above, the obligation of fair treatment deals only with the conciliation process conducted by the conciliator and does not deal with the content of any conciliation settlement).

Paragraph (4) clarifies that a conciliator may, at any stage, make a proposal for settlement. It is left to the discretion of the conciliator to decide whether, to what extent, and at which stage to make any such proposal depending on the wishes of the parties and the method which would be most conducive to a settlement.

4. Choice of law rules

The Model Law does not determine the applicability of the law by reference to the place of conciliation. The reason is that the parties often do not designate a place of conciliation (as they would normally do when they arbitrate). For practical purposes, the conciliation could be carried out in several places and increasingly also exclusively by electronic means. Hence it would be problematic to insist on the potentially artificial idea of the place of conciliation as the primary basis for triggering the application of the Model Law. The issue is thus left to the agreement of the parties and, failing that, to the rules of private international law.⁶⁴

C. Confidentiality: The cornerstone of successful conciliation

To optimize chances of success, the scope of discussion between the parties and conciliator must allow for an exploration and understanding, as much as possible, of the issues between the parties, the background and circumstances that gave rise to the issues (including the reasons for which the parties were unable to reach agreement), and the possibilities for the parties to overcome the existing issues and to settle the dispute. In many cases, this discussion could extend to matters beyond the immediate issues at the conciliation.

One of the main pillars of conciliation has been to allow parties to make statements that they would normally not make in court or arbitral proceedings, or delve into matters that would normally not be considered in arbitral or court proceedings, including those that the parties deem damaging to their position. If there was risk of the information reaching the public domain or used against the party that provided the information as evidence in arbitral or court proceedings in the event the conciliation failed, then parties would not be as forthcoming with information during the conciliation process. This could potentially jeopardize the chances of success for the conciliation.

64. U.N. Doc. A/CN.9/506, ¶¶ 18-21. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

It is therefore critical that safeguards are afforded to parties, providing the desired degree of legal protection against unwanted disclosure of certain facts and information. These safeguards are “the centerpiece of the conciliation regime” and the single most important reason why legislation on conciliation is needed.

1. The disclosure of information between the parties

In arbitration, where the arbitral tribunal imposes a binding decision on the parties, one of the grounds for setting aside the arbitral award is the violation of full disclosure of the information that the arbitral tribunal uses as a basis for its decision. In conciliation, however, since the outcome of the proceedings depends upon the parties, the parties have more freedom to decide on the way in which information received by the conciliator should be handled.

There are two possible and competing expectations of disclosure. First, it may be important for the confidence of the parties in conciliation, and for many conciliators a matter of good practice that, in principle, whatever information a party gives to a conciliator will be disclosed to the other party. This would give the other party a fair opportunity to present any explanation which it considers appropriate. Secondly, it may be equally important for a party to be able to talk to the conciliator knowing that the substance of the conversation will not be disclosed to the other party.

The conciliator would have to look at the circumstances of the case and established practices to decide how to manage the above issue of disclosure of information between the parties. When it is possible for the conciliator to disclose information received from one party to the other party, a party may wish to give certain information to the conciliator subject to a specific condition that it be kept confidential, and the conciliator may agree to observe that condition.⁶⁵

The rule protecting such confidentiality may be established by contract. Article 10 of the UNCITRAL Conciliation Rules contains such a rule.⁶⁶ The Model Law reinforces this solution with a statutory provision that applies as a default rule even if the parties have not expressly agreed on such a rule. In particular, Article 8 of the Model Law provides:

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

65. U.N. Doc. A/CN.9/468, ¶¶ 54-55; U.N. Doc. A/CN.9/487, ¶¶ 128-134; U.N. Doc. A/CN.9/506, ¶¶ 75-82; U.N. Doc. A/57/17, ¶¶ 61-73. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

66. The provision reads: "When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party."

This means that the default position in the Model Law is that when a party gives information to a conciliator, it will be disclosed to the other party in order that the other party may have the opportunity to present any explanation. If the parties want the other solution (i.e. that the substance of information given by one party will not be disclosed to the other party), they have to specifically agree to it.

This provision enables the party to give the information to the conciliator "subject to a specific condition that it be kept confidential" and hence this means that the party can control the information which should be or not be released or kept by the conciliator from the other party. If the conciliator should consider that the condition is not helpful, it may be discussed with the party, but ultimately, the conciliator must respect the confidentiality of the information.

2. General duty of confidentiality

Generally, parties involved in a conciliation desire, or even expect, that the information discussed in and relating to the proceedings remains confidential vis-a-vis third parties. A party would be reluctant to discuss issues in conciliation proceedings openly if there were no assurance that what is being discussed would be kept confidential. There is, in principle, no public policy ground that would argue against such general assurances of confidentiality, and thus the UNCITRAL Conciliation Rules as contractual rules (Article 14), and the text of the Model Law (Article 9) establish a general duty of confidentiality. The provision is drafted broadly, referring to "all information relating to the conciliation proceedings," to cover not only information in statements regarding the points in issue made during the conciliation proceedings, but also to cover the results of those proceedings (such as the content of the settlement).⁶⁷

3. Limitations on confidentiality

The obligation of confidentiality cannot be absolute and must yield to a duty to disclose specific information when this is dictated by a significant public policy objective, such as when disclosure is needed to investigate a crime or to prevent a safety or environmental threat. It is desirable to provide as much certainty and predictability to the parties as possible concerning the extent of the duty of confidentiality and specific exceptions thereto. However it was impossible to list all the exceptions in particular because it is difficult to predict the situations where the public interest would have to prevail over private interests. Therefore, the Model Law expresses the exceptions with the general phrase: "except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement."⁶⁸

67. U.N. Doc. A/CN.9/506, ¶¶ 83-86; U.N. Doc. A/57/17, ¶¶ 74-81. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

68. U.N. GAOR, 57th Sess., Supp. No. 17, Annex 1, at Art. 9.

4. Admissibility of evidence in other proceedings

The possibility that a party might use views, admissions, proposals, and similar information arising from the other party as evidence in subsequent court or arbitral proceedings would seriously impede a frank and open discussion in conciliation proceedings. This is perhaps the most primary concern that parties have when they consider agreeing to conciliate and, more particularly, when they make statements and proposals during conciliation proceedings. It is therefore critical that the parties obtain a credible assurance that such information will not be admitted as evidence in other proceedings.⁶⁹

In order to address this matter, Article 20 of the UNCITRAL Conciliation Rules provides a contractual solution according to which "the parties undertake not to rely on or introduce as evidence"⁷⁰ the information specified in the article made by the conciliator. Such a contractual solution may work satisfactorily in a particular context, and where there is no law on conciliation, it is the only safeguard available to the parties. However, it does not provide a comprehensive solution in all cases and in all jurisdictions: its effects depend on the interpretation of the agreement. There will be cases where the parties will conciliate without agreeing on a solution such as the one in Article 20 of the UNCITRAL Conciliation Rules. The agreed rule of evidence binds only the parties to the agreement and not other persons who may have participated in the proceedings, but are not bound by the agreement.

Further, it is not at all certain whether courts in all jurisdictions will give full effect to an agreement of the parties limiting the admissibility of evidence, because such agreements may be subject to limits or may be superseded by the power of the court to hear evidence to clarify the facts of the case. It is therefore desirable that there be a straightforward statutory provision limiting the admissibility of certain types of evidence. The Model Law contains such a solution in Article 10.

The effect of this rule is strengthened by the concomitant obligations of courts, arbitral tribunals or other competent governmental authorities not to order the disclosure of such information and, further, if such information is offered as evidence in contravention of the non-admissibility rule, to treat the evidence as inadmissible (Article 10(3)).

In situations where certain evidence might be covered by the inadmissibility rule of Article 10, akin to the exception in Article 9, the inadmissibility would

69. U.N. Doc. A/CN.9/468, ¶¶ 22-30; U.N. Doc. A/CN.9/485, ¶¶ 139-45; A/CN.9/487, ¶¶ 139-41; U.N. Doc. A/CN.9/506, ¶¶ 101-15; U.N. Doc. A/57/17, ¶¶ 82-91. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

70. ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20. The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

- (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) Admissions made by the other party in the course of the conciliation proceedings;
- (c) Proposals made by the conciliator;
- (d) The fact that the other party had indicated his willingness to accept a proposal for settlement

have to be set aside by a compelling reason of public policy. Again, for the same reasons previously discussed with respect to Article 9, the exceptions are expressed in a general manner.

Paragraph (4) makes paragraphs (1) to (3) of Article 10 applicable whether or not the arbitral, judicial, or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings. This provision eliminates the possibility of avoiding the application of Article 10 by introducing evidence in proceedings where the main issue is different from the issue considered in the conciliation.

Parties do not forfeit the use of information presented in conciliation proceedings which existed or was created for purposes other than the conciliation. This information is precluded from inadmissibility. In order to put this beyond doubt, paragraph (5) clarifies that "evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation." For example, an invoice or confirmation of receipt produced in conciliation proceedings would not be covered by the inadmissibility rule because the invoice or receipt was admissible evidence at the moment it was used in the conciliation proceedings and its use in those proceedings does not make it inadmissible. Thus, it is only the types of evidence specified in paragraph (1) (i.e., views, admissions, proposals, and indications of willingness to settle) that are inadmissible, not any evidence that was the basis for expressing a view, admission, proposal, or willingness to settle in the conciliation proceedings. A party that uses such evidence in conciliation proceedings may use that evidence in subsequent proceedings, just as it could if the conciliation had not taken place.

5. Prohibition for conciliator to act as arbitrator

A conciliator cannot become an arbitrator in subsequent proceedings because he or she would be aware of information that is inadmissible as evidence in the arbitration and which a party might not want to be introduced into the arbitral proceedings. Although there is a formal inadmissibility rule with respect to this evidence, it was believed that this prohibition would provide an additional safeguard since in the minds of the parties the formal inadmissibility would not be sufficient to protect its interests. Parties may be less willing to participate in conciliation proceedings if they would have to contend with the possibility that, if the conciliation is unsuccessful, the conciliator might be appointed (e.g., by the other party or the appointing authority) as an arbitrator in subsequent proceedings. It was therefore necessary for the Model Law to reinforce Article 10 by the provision in Article 12.⁷¹

Nevertheless, practice shows that in some cases the parties might regard the fact that a person acted as a conciliator in a dispute (and thereby gained knowledge about the circumstances of the dispute) as advantageous. For example,

71. It states that "the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship." U.N. Doc. A/CN.9/485, ¶¶ 147-53; U.N. Doc. A/CN.9/487, ¶¶ 142-45; U.N. Doc. A/CN.9/506, ¶¶ 116-23. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

the parties may consider that such an arbitrator would conduct the case more efficiently. In these cases, there may be no reason to prevent the parties from jointly appointing such a person as an arbitrator (or for a party to appoint him or her with the consent of the other party). The provision has two limbs; it applies to "a dispute that was or is the subject of the conciliation proceedings" and hence this covers both past and ongoing conciliations. The second limb refers to a dispute "in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship." This extends the scope of the article to cover disputes arising under contracts that are distinct but commercially and factually closely related to the subject matter of the conciliation.

6. *Enforceability of settlement agreements*

Legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. In some countries, a settlement reached in conciliation is enforceable as a contractual obligation (i.e., a party must initiate proceedings to obtain an entitlement capable of being enforced by judicial organs charged with the enforcement of judicial decisions). In other countries, there exist rules declaring certain settlements to be enforceable entitlements, or possibilities for turning a settlement into an enforceable entitlement (e.g., the parties may appoint an arbitrator specifically to issue an award on agreed terms based on the settlement, or the settlement is notarized or co-signed by the attorneys of the parties).

It was not possible to find a solution that would be acceptable world-wide, and the Model Law adopted the principle reflecting the lowest common denominator by providing that: "If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]." It is thus left to the enacting State to select the enforcement regime that is best suited to its procedural laws and practices.⁷²

III. COMPARING AND SQUARING THE UMA AND UNCITRAL MODEL LAW

A. *Comparing the UMA and UNCITRAL Model Law*

Like the UMA in the United States, the primary focus of the UNCITRAL Model Law on International Commercial Conciliation is confidentiality. The Drafters viewed the issue of confidentiality as tied to other policies as well which include:

72. U.N. Doc. A/CN.9/468, ¶¶ 38-40; U.N. Doc. A/CN.9/487, ¶¶ 153-59; U.N. Doc. A/CN.9/506, ¶¶ 38-48; U.N. Doc. A/57/17, ¶¶ 119-26. These documents are available on the UNCITRAL website: UNCITRAL, *Adopted Texts-travaux préparatoires* <<http://www.uncitral.org/en-index.htm>> (accessed Mar. 14, 2003).

- Confidentiality and candor;
- fostering prompt, economical, and amicable resolution; and
- integrity in the process leading to self-determination by the parties.

The Model Law drew its inspiration from the UNCITRAL Conciliation Rules⁷³ and the UMA. Both the UMA and the Model Law are designed to promote party autonomy with respect to mediation and conciliation, making clear that it is the parties who are to resolve the dispute, rather than the mediator or conciliator. Like the UMA, the cornerstone of the Model Law are a set of basic rules related to confidentiality of the proceedings, and strict limits on the use of information in subsequent judicial or arbitral proceedings. The Model Law also provides some default rules for parties on the appointment of the mediator or mediators and the conduct of the proceedings.

There are also some significant differences between the UMA and the Model Law. For one, the UMA covers the formal mediation of all disputes, while the Model Law is intended only for commercial disputes. This difference is necessary because national policies regarding non-commercial matters differ more widely than regarding commercial matters, and it would therefore have been more difficult to agree on harmonized worldwide solutions. Moreover, UNCITRAL's work is typically limited to commercial matters. Similarly, the UMA has a clearly articulated triggering mechanism,⁷⁴ while the Model Law does not have a formal triggering mechanism. This is sensible because of the extraordinary range of legal, cultural, and commercial environments that can give rise to an international commercial conciliation or mediation. Finally, the Model Law includes a prohibition on the disclosure of communications outside of formal proceedings,⁷⁵ while the UMA leaves such disclosures to contract.⁷⁶

B. Squaring the Model Law with the UMA in the United States

From the point of view of practice in the United States, the UNCITRAL amendment to the UMA would provide an optional provision in the UMA for those states that seek to adopt the Model Law. The amendment would make the UNCITRAL provisions consistent with the privilege provided in the UMA.

The approach taken in state law could best accommodate the purposes of the United States in joining in supporting the Model Law and maintain consistency with the UMA if it could accomplish all of the following:

1. Retain as much of the exact language of the Model Law as possible;
 2. Provide for a mediation privilege that is consistent with the UMA;
- and

73. UNGA, U.N. Doc. 35/52 (1980).

74. See Unif. Mediation Act Section 3(a) (2001).

75. GET CITE.

76. See Unif. Mediation Act Section 8 (2001).

3. Avoid a situation in which parties are uncertain which law applies at the time they mediate their dispute.

Each of these goals is described in more detail below.

Since the United States participated in an effort to achieve language that could be adopted by all nations in the world in order to encourage greater use of conciliation for international disputes, it seems especially important to try to make only minimal changes in the language. It should be noted that during the UNCITRAL drafting process, reference was repeatedly made not only to concepts of the UMA but also to specific language and provisions.

UNCITRAL anticipates that nations will make changes in model laws since this is a model law and not a treaty. However, the UMA Drafting Committee took to heart the UNCITRAL Draft Guide admonition: "In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal system, but, if changes are made, they should remain within the basic principles of the Model Law."⁷⁷ A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers, and conciliators who participate in conciliations in the enacting state.

The UNCITRAL Model Law includes both provisions that would typically be drafted very differently in the United States and provisions that conflict with existing state laws applicable to international commercial mediations. This presented a dilemma for a NCCUSL drafting committee, during the December 2002 meeting, as the drafters tried to change the Model Law provisions as little as possible while dealing with style and drafting issues in the model law that might lead to unintended results in this country or make it unclear to the conciliation parties which law applied. There is the additional concern that foreign parties need to know that the United States' version of the Model Law is consistent in crucial areas with their own countries' adoption of the Model Law.

The Drafters of the amendments to the model law resolved the applicability dilemma by limiting the law's application to situations in which the strongest arguments for consistency with international language could be made -- international commercial disputes -- and would oppose the provisions of the model law that would permit the parties to agree to have the Model Law applicable to other types of mediation. The Model Law invites countries that do not have a domestic law on mediation to adopt it for other types of mediations.

IV. CONCLUSION

The drafting of the UMA and the Model Law are important steps in the development of mediation and conciliation in the United States and internationally. They represent strong statements of consensus support for the process, and the importance of its central features of confidentiality, personal autonomy, and neutrality, by several of the world's leading law reform

77. U.N. Doc. A/CN.9/WG.II/WP.116, Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, at pg. 7.

organizations -- UNCITRAL, the American Bar Association, and the National Conference of Commissioners on Uniform State Laws -- who worked with hundreds of advisors, observers, and commenters in forging this consensus. Crucially, the two Acts have been coordinated to assure consistency of treatment both domestically and internationally. For all of these reasons, the acts also present unique opportunities to use this consensus to clarify the law affecting mediation in significant respects, which will further the confidence of businesses and other users of the mediation and conciliation process.. It is our hope that states domestically and internationally will give them the most serious of consideration, and join the international consensus that recognizes and supports mediation and conciliation processes upon which mediation participants may reasonably rely regardless of jurisdiction, and rightfully encourages their consideration by parties as a potentially more efficient, more effective, more civil, and more satisfying means of resolving their disputes.